

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
leemarz@aol.com

1 A P P E A R A N C E S :

2 FOR THE PLAINTIFFS:

3 ANDREW G. FINKELSTEIN, ESQ.  
4 Finkelstein & Partners, LLP,  
1279 Route 300  
5 Newburgh, NY 12551

6 MARC A. DILLER, ESQ.  
Diller Law, LLP  
7 50 Congress Street, Suite 430  
Boston, MA 02109  
8

9 FOR THE DEFENDANTS:

10 JACK W. PIROZZOLO, ESQ.  
11 KATHERINE LUNDWALL ALESSI, ESQ.  
Sidley Austin LLP  
12 60 State Street  
34th Floor  
13 Boston, MA 02109

14 SCOTT D. BURKE, ESQ.  
Morrison Mahoney LLP  
15 250 Summer Street  
Boston, MA 02210-1181  
16

MARTIN G. WEINBERG, ESQ.  
17 Martin G. Weinberg, PC  
20 Park Plaza  
18 Suite 1000  
Boston, MA 02116  
19

ANDREW O'CONNOR, ESQ.  
20 Ropes & Gray - MA  
Prudential Tower  
21 800 Boylston Street  
Boston, MA 02199-3600  
22

DANIEL K. GELB, ESQ.  
23 Gelb & Gelb, LLP  
900 Cummings Center, Suite 207 V  
24 Beverly, MA 01915  
25

1 A P P E A R A N C E S: (Cont'd)

2 TRACY A. MINER, ESQ.  
3 Miner Siddall LLP  
4 101 Federal Street, Suite 101  
Boston, MA 02110

5 LON F. POVICH, ESQ.  
6 Anderson & Kreiger LLP  
7 50 Milk Street, 21st Floor  
Boston, MA 02110

8 DANIEL N. MARX, ESQ.  
9 Fick & Marx LLP  
24 Federal Street, 4th Floor  
Boston, MA 02110

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

THE CLERK: Court Calls Civil Action 21-11181, Steiner, et al vs. eBay. Could counsel please identify themselves.

MR. FINKELSTEIN: Andrew Finkelstein, Finkelstein & Partners, on behalf of the Plaintiff Steiner.

MR. DILLER: Marc Diller, Diller Law, on behalf of the plaintiffs, your Honor.

THE COURT: Marc Diller?

MR. DILLER: Marc Diller, yes. Nice to see you, your Honor.

THE COURT: All right, good.

MR. PIROZZOLO: Jack Pirozzolo on behalf of eBay, and with me is Katherine Alessi, also on behalf of eBay.

MR. WEINBERG: Good morning, your Honor. Martin Weinberg on behalf of Devin Wenig.

MR. POVICH: Good morning, your Honor. Lon Povich on behalf of Steve Wymer.

MR. O'CONNOR: Good morning. Andrew O'Connor for Wendy Jones.

MR. BURKE: Good morning. Scott Burke for PFC.

MR. GELB: Good morning, your Honor. Daniel Gelb for David Harville.

MS. MINER: Good morning, your Honor. Tracy Miner for Phil Cooke.

1 MR. MARX: Good morning. Daniel Marx for Jim Baugh.

2 THE COURT: Okay, thank you. You may be seated. I  
3 believe you all asked for a status conference but didn't really  
4 give me any heads-up about what; and just because you all  
5 asked, I agreed to it, but I don't usually allow status  
6 conferences where I don't know what the issue is.

7 MR. PIROZZOLO: So the reason we asked for the status  
8 conference, your Honor, is that, as you may know, the parties  
9 engaged in a mediation last month. We do not intend and I'm  
10 not going to be asking the Court to get involved in the  
11 mediation or any settlement discussions at all. However, at  
12 the mediation, it became apparent that there's a significant  
13 legal issue that the parties need guidance on from the Court in  
14 order to move forward with settlement discussions in a  
15 meaningful way, and that legal issue is the question of punitive  
16 damages. It is eBay's view that punitive damages are no longer  
17 part of this case because of the Court's ruling on the motion  
18 to dismiss, which found that Massachusetts law applies and  
19 dismissed the California stalking statute. The plaintiffs  
20 disagree and believe that punitive damages remain in the case.  
21 I will say, predecessor counsel after the Court's ruling  
22 actually removed punitive damages from their damages demand, so  
23 that's gone in terms of --

24 THE COURT: You mean for mediation purposes or for  
25 trial?

1 MR. PIROZZOLO: Well, I don't know that I want to  
2 disclose what was in mediation, but --

3 THE COURT: I know, but was it struck from the  
4 complaint?

5 MR. PIROZZOLO: It was struck from the initial  
6 disclosure. So the original initial disclosure damages had  
7 punitives. The Court came out with its ruling, and the  
8 plaintiffs removed the punitive damages from their demand.

9 THE COURT: I understand. The problem is, you may all  
10 think I'm more knowledgeable than I am. I just ruled on one  
11 count. I ruled on one count. I'm sticking with it. I reread  
12 it. I think it's true. My guess is that I have to go, I think  
13 the law is, count by count. I don't know if Massachusetts law  
14 covers punitives for each of the additional counts. I don't  
15 know why you think I can wing it. I think I need briefing on  
16 it.

17 MR. PIROZZOLO: To be clear, that's what we're here  
18 for. So the reason that we came is, we needed a procedural  
19 mechanism for purposes -- guidance as to what the procedural  
20 mechanism should be here to get that teed up. So one would be  
21 a motion for clarification that we could file. Another would  
22 be a motion to strike. Another possibility would be a motion  
23 for partial summary judgment. And that was the purpose of the  
24 status is, we wanted to see how we could get this in front of  
25 the Court.

1           THE COURT: I don't really know plaintiffs' counsel in  
2 this case. You're new. Is your position that Massachusetts  
3 law carries punitives for some of these counts?

4           MR. FINKELSTEIN: We believe California law applies,  
5 which we want to brief to the Court, and we'll outline the  
6 reasons why.

7           THE COURT: Wait a minute. You are unlikely to  
8 prevail on that with every single count. There may be some  
9 counts for which it does apply. I don't know. But I can't  
10 wing it. That was not briefed for me. So you could do it on a  
11 motion for summary judgment, partial summary judgment. That's  
12 often the way that you handle -- I've had that before just on  
13 damages. In fact, I think it says that, right? In any event,  
14 we could do it through a motion for partial summary judgment.

15           MR. PIROZZOLO: That would be fine, your Honor. I  
16 mean --

17           THE COURT: You'd think I would know by heart Rule 56,  
18 but it's any claim -- it's any partial.

19           MR. PIROZZOLO: It's permitted. It is disfavored,  
20 which is one of the reasons why we wanted to come and get  
21 clarity from the Court that you would permit that.

22           THE COURT: But I know I've done it before on specific  
23 claims for specific kinds of damages. Is this the barrier to  
24 settlement? Is that it? Is this the only thing?

25           MR. PIROZZOLO: I would not say that's the only

1 barrier, but that became a significant issue in the settlement  
2 discussions. And obviously Mt. Finkelstein can speak for  
3 himself.

4 THE COURT: Actually, it doesn't say damages. "A  
5 party may move for summary judgment identifying each claim or  
6 defense or the part of each claim or defense." So maybe that  
7 would pick it up.

8 My problem is that I -- it took me forever to get  
9 through the motion to dismiss because everybody filed a  
10 separate one, and I am about to embark on brand-new law clerks.  
11 It's an issue for me to go through -- can you agree to have one  
12 brief per side?

13 MR. PIROZZOLO: Absolutely.

14 MR. FINKELSTEIN: Yes, very focused on this one issue.

15 MR. PIROZZOLO: We see this as a single issue.

16 MR. FINKELSTEIN: Right.

17 THE COURT: Well, let me just say this: It isn't a  
18 single issue. Do I remember correctly that the availability of  
19 punitives would go count by count, and choice of law will go  
20 count by count? It's not an across-the-board thing. Clearly  
21 stalking I felt was not California law; it was here because  
22 this is where the locus of the injury was, and I'm likely to  
23 find the same thing on certain things. Like, false  
24 imprisonment would be an example where it was all here or that  
25 sort of thing. Now, does false imprisonment carry punitives

1 under state law?

2 MR. PIROZZOLO: No. None of the remaining counts  
3 carry punitive damages under Massachusetts law, not one.

4 THE COURT: Do you agree with that?

5 MR. FINKELSTEIN: I do agree with that, but I do  
6 believe that there is a doctrine of depechage which allows,  
7 where the conflicts of law specifically related to punitive  
8 damages related to compensatory claims, that it can be  
9 separated, that the law -- which is why we want to brief this  
10 for your Honor -- the law provides that one state's punitive  
11 damages can be followed while another state's compensatory  
12 damages could be followed for the same underlying --

13 THE COURT: I've never run across that, but I look  
14 forward to seeing what case you have that would support that.  
15 Has the SJC followed that?

16 MR. FINKELSTEIN: Yes, and we'll brief it, and that's  
17 the focal point of the brief of where counsel --

18 THE COURT: I'm happy to listen, but I will say that I  
19 reread what I said about California, and I'm quite sure I will  
20 say choice of law is Massachusetts for some of the counts.  
21 Whether it's all of them, I just didn't sit and go through  
22 every single one of them.

23 MR. FINKELSTEIN: Well, we welcome the opportunity  
24 because we know you'll approach this with an open mind and give  
25 us the decision as appropriate.

1 THE COURT: In the meantime, I don't know why you're  
2 all here. It probably cost a gazillion dollars. I'm not the  
3 kind of judge -- some do, some love it this way -- everybody  
4 has their own style -- who you can just call up and ask for a  
5 status. I think what might have been less expensive for people  
6 and more efficient is just a joint motion for a procedural  
7 order that provides for a motion for summary judgment on the  
8 issue of choice of law and punitives, and I probably would have  
9 just said "allowed." But while you're all here, is there  
10 something else I can accomplish? How close are we to the end  
11 of discovery?

12 MR. PIROZZOLO: So, yes, I do want to add, you have  
13 actually previously addressed this very issue that plaintiffs  
14 have raised in the *Glenn Beck* case that you decided a few years  
15 ago, and so you have decided this issue.

16 THE COURT: The *Glenn Beck* case, that's a long time  
17 ago.

18 MR. PIROZZOLO: Yes, so 2016, I think, the *Blaze* case.

19 THE COURT: All right, maybe I did.

20 MR. PIROZZOLO: And then the First Circuit has also  
21 ruled on this question of depechage and said it doesn't apply in  
22 this circuit. So we think the law is crystal clear --

23 THE COURT: It may be.

24 MR. PIROZZOLO: -- and that's for briefing, I  
25 understand. But in terms of discovery, discovery is moving

1 along. As you know, you extended fact discovery out to the end  
2 of September. We anticipate that we'll be completed by then.

3 THE COURT: Then I just set a trial date.

4 MR. PIROZZOLO: So, yes, the current scheduling order  
5 doesn't have a trial date set. It says "TBD," so I think --

6 THE COURT: Do you want to set one right now?

7 MR. PIROZZOLO: Sure.

8 MR. FINKELSTEIN: Sure.

9 THE COURT: Because here's the thing: I mean, there  
10 may be one or two of the defendants who could get out on  
11 summary judgment, but the bulk of the defendants will probably  
12 stay in, and so I think it's worth setting a date. Have you  
13 talked about whether it makes any sense to try all the  
14 defendants -- summary judgment would apply, I think, on  
15 liability for the ones who were convicted, but I'm not sure it  
16 would lie for every single one of the counts. That I'm not  
17 sure about.

18 MR. PIROZZOLO: So the current schedule --

19 THE COURT: -- summary judgment in plaintiff's favor  
20 on eBay that their -- regardless of the individuals, whether or  
21 not their agents acted, or would there still be a scope of  
22 responsibilities issue?

23 MR. PIROZZOLO: It's going to be quite relevant what  
24 the precise basis of liability would be, whether it's simply a  
25 vicarious theory. There's a count that remains in the case

1 regarding ratification. That's going to be highly contested.

2 THE COURT: I see. So the board of directors will  
3 testify they didn't know and that sort of thing?

4 MR. PIROZZOLO: Exactly, exactly right.

5 THE COURT: So do you want to set it for January?

6 MR. PIROZZOLO: Your Honor, the current scheduling  
7 order -- I think that's too soon. The current scheduling order  
8 has expert disclosures and *Daubert* motions by the end of  
9 December and summary judgment by the middle of February.

10 THE COURT: Oh, all right.

11 MR. PIROZZOLO: And I think that's all we can do, I  
12 think, to meet that schedule.

13 THE COURT: Let me ask you, what kind of expert do you  
14 need here? This is such a straightforward case. I mean,  
15 emotional distress like psychiatric damages, that kind of  
16 expert?

17 MR. PIROZZOLO: Yes, just two, and I think there may  
18 be a third, but the two, there's an IME. So we're currently in  
19 the process of having an IME take a look because there's an  
20 emotional distress component of damages, so essentially a  
21 medical expert; and then there's a claim of harm to business,  
22 destruction of business, so again a financial expert.

23 THE COURT: All right, fair enough, fair enough.

24 MR. PIROZZOLO: And I believe the plaintiffs have  
25 signaled that they are going to have a defamation expert, I

1 believe, as well, so there's going to be an expert regarding --

2 THE COURT: Harm to reputation?

3 MR. FINKELSTEIN: Yes, business reputation.

4 THE COURT: I see, okay. So I have no opinion about  
5 that, but I do understand that expert discovery is necessary.  
6 So on motions for summary judgment, I think we probably do need  
7 that because it may go both ways. I mean, plaintiff may be  
8 able to get summary judgment on some of the things, defense may  
9 be able to get summary judgment on some of the things, and it  
10 would pare down the trial.

11 MR. PIROZZOLO: Right. And I think you signaled at  
12 the last status, your Honor, that you weren't quite ready to  
13 set a trial date because I think in part you said you needed  
14 some time to think through the summary judgment motions that  
15 you anticipated, so that's why the current scheduling order  
16 doesn't have that.

17 THE COURT: So since I won't be granting any  
18 additional continuances -- well, just let me ask you this:  
19 Given the fact that I'm going to be hitting summary judgment  
20 anyway within a few months, when is the summary judgment due?

21 MR. PIROZZOLO: So oral argument is February 13. The  
22 memos should all be in front of you by the second week of  
23 January.

24 THE COURT: I'm just saying, why don't I just do this  
25 issue as part of the summary judgment briefing? Why am I doing

1 this in a segmented way? By the time I get the briefs in,  
2 let's say in 30 days, then let's say the op comes in -- I know  
3 the way you all brief this, right? -- no extra pages, by the  
4 way, let me just put it there -- so then the ops come in three  
5 weeks later, we're now talking end of September, a reply  
6 mid-October, I have a hearing, let's say, end of October,  
7 beginning of November, and then I have to write it. Why am I  
8 segmenting it? Everything's at the same time.

9 MR. PIROZZOLO: So for a couple of reasons. I think,  
10 first of all, we're hoping that it could be decided more  
11 quickly than that, and I'm certain that we could agree to an  
12 expedited briefing schedule in front of the Court so it's not a  
13 standard set of summary judgments. Our hope is that by getting  
14 this, we're not going to have to go through a whole bunch of  
15 the other discovery that's going to --

16 THE COURT: So I tell you what: You get together.  
17 Whatever you propose I'll agree on, other than the fact that I  
18 have a mega trial starting in September which will leave me  
19 very busy for at least a month. We have another mega trial  
20 starting in early April. I have a bunch of scatterings of  
21 littler trials that I'm not so worried about, but one huge  
22 commercial dispute, *Cynosure v. Reveal*, which is a big trade  
23 secrets case, and in March I believe I have a large criminal  
24 prosecution some of you may be involved in involving lead paint  
25 testing, *Magellan*, and the defendant is I think *Winslow*? Is

1 that right? So I need to somehow squeeze this in either before  
2 or in between the two of them, or it will come in after the  
3 *Winslow* case next spring is how it will likely go. Now, you  
4 never know. Everyone pleads and continues. Anyway, I'm  
5 counting on each of those are month-long trials. In fact,  
6 *Winslow* said it was two months, so I'm a little worried about  
7 where I'm going to fit this because this is a very important  
8 case, so I'd like to finish it earlier rather than later.

9 Let me say, let's assume I say punitives do or do not  
10 apply, does that settle the case, or am I still going to have a  
11 case no matter what?

12 MR. PIROZZOLO: It's really hard to answer that, but  
13 it will go a long way towards putting the parties in a position  
14 where there's a zone where there could be a settlement. That's  
15 why we're here. We're not here to waste everybody's time.

16 THE COURT: Well, let's say I say no punitives,  
17 Massachusetts law applies, or these common law actions don't  
18 carry punitives?

19 MR. FINKELSTEIN: It's just a completely different  
20 case than what we view it as, and we'll meet with our clients  
21 and, as we already have, make a good-faith effort to resolve  
22 the matter. We made headway but hit --

23 THE COURT: You may decide, "Oh, that Judge is really  
24 wrong and we're going to go all the way through to trial." And  
25 then the flip side is, if I say you can get punitives from this

1 theory I don't know much about, what does that do for you?

2 MR. PIROZZOLO: Well, obviously it affects our  
3 settlement position. I can't represent to the Court that we  
4 would settle under those circumstances, but it clearly is  
5 relevant to what the posture would be.

6 THE COURT: I understand. I fully get why you all  
7 need a ruling on this. I'm just saying, for me to rush, rush,  
8 rush, get a ruling, and then one or the other of you is going  
9 to say, "If you rule against me, I'm going to trial," it sort  
10 of doesn't help me.

11 MR. FINKELSTEIN: I don't think that's the position of  
12 either of the parties. I don't want to speak for eBay but --

13 THE COURT: Okay, then it's worth it.

14 (Discussion between the Court and Clerk.)

15 THE COURT: Yes, we're having a hearing on summary  
16 judgment in mid-February.

17 THE CLERK: February 13.

18 THE COURT: Just to make sure you're on there, and  
19 it's at that point I think I'll set a trial date. But  
20 depending on when you agree to get in all the briefing on this,  
21 I'm assuming it will come in by, if you're going to expedite  
22 it, by September, say.

23 And can I say also, at that point I'll be in the  
24 middle of this massive trial that I do not expect to settle,  
25 and so I'm not making promises as to when I will get out the

1 ruling. I suppose I could do a bottom-line ruling, but, you  
2 know, I take -- you saw what I -- I take time on it. You know,  
3 I always tell people it will take at least three to six months  
4 if it's a major opinion, if it's a hard issue.

5 MR. PIROZZOLO: Understood, your Honor, although we do  
6 think that if we get it even before the summary judgment hearing  
7 in February, that's still helpful to the parties.

8 THE COURT: Okay. Who's your mediator?

9 MR. PIROZZOLO: Paul Finn. He's in Brockton.

10 THE COURT: Okay, good. Well, let me just say this:  
11 That if you need clarification or you want to propose a  
12 procedure to resolve an issue, it really is easier for me,  
13 rather than calling up Maryellen and saying, "I need a status  
14 conference," just file a motion for a procedural order, ideally  
15 joint, or file a motion for clarification, ideally joint. But  
16 even if it's not joint, at least I'll know it's teed up for me,  
17 because if you had given me the cases, I could have maybe even  
18 given you a little preview today, but I didn't really know what  
19 it was. Okay?

20 All right, this sounds good. Have a wonderful rest of  
21 the summer.

22 MR. PIROZZOLO: Thank you, Judge.

23 MR. FINKELSTEIN: Thank you, your Honor.

24 THE CLERK: All rise.

25 (Adjourned, 11:24 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 17 inclusive, was recorded by me stenographically at  
the time and place aforesaid in CA No. 21-11181-PBS, Ina Steiner,  
et al v. eBay Inc., et al, and thereafter by me reduced to  
typewriting and is a true and accurate record of the  
proceedings.

Dated this 19th day of July, 2024.

/s/ Lee A. Marzilli

---

LEE A. MARZILLI, CRR  
OFFICIAL COURT REPORTER